

**BEFORE the HEARING EXAMINER for the
CITY of LYNNWOOD**

DECISION

FILE NUMBER: CAP-013010-2016

APPLICANT: Robert Gregg
16550 76th Avenue W
Edmonds, WA 998026

TYPE OF CASE: Reasonable Use Exception to construct a drive-thru only coffee shop within the required buffers of a wetland and a stream

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: January 17, 2017

INTRODUCTION ¹

Robert Gregg (Gregg), as agent for the property owner Tanya Benvenuti and the prospective business owner Brashear (sp?), seeks a Reasonable Use Exception (RUE) from the provisions of Chapter 17.10 Lynnwood Municipal Code (LMC), Environmentally Sensitive Areas, to construct a drive-thru only coffee shop within the required buffers of a wetland and a stream.

Gregg filed the RUE application on or after August 5, 2016. (Exhibit 2 ²; and testimony) The Lynnwood Public Works Department (Public Works) deemed the application complete on October 10, 2016. (Exhibit 1, p. 4)

The subject property currently does not have an address. (Exhibit 1, p. 1) It is located on the northeast side of Alderwood Mall Parkway between Maple Road and an existing small retail strip mall.

The Lynnwood Hearing Examiner (Examiner) viewed the subject property on January 12, 2017.

The Examiner held an open record hearing on January 12, 2017. The City gave notice of the hearing as required by the LMC. (Exhibit 1, p. 3)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

² Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

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The following exhibits were entered into the hearing record during the hearing:

Exhibit 1:	Departmental Staff Report
Exhibits 2 - 9:	As enumerated in Exhibit 1 at p. 3
Exhibit 10:	Determination of Nonsignificance, issued November 23, 2016
Exhibit 11:	Revised site plan, dated November 19, 2016

Exhibits 10 and 11, although in the City's possession at the time of the hearing, were not available to be formally submitted. The Examiner held the record open through close of business on January 13, 2017, for submittal of copies of those materials. Exhibits 10 and 11 were provided electronically later on the afternoon of January 12, 2017. The record closed upon their receipt.

No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The subject property is a 28,314 square foot (SF), triangular parcel bordered on the southwest by Alderwood Mall Parkway, on the north by undeveloped public right-of-way associated with the Alderwood Mall Parkway/Maple Road intersection, and on the east by a small retail strip mall. A Type Np stream flows along the eastern edge of the property, passing through a Category II wetland along its course. The critical areas and their required buffers, even if the latter were reduced to the minimum allowed by City code, encumber the entirety of the subject property. (Exhibits 3; 11)
2. Gregg's clients, Benvenuti and Brashear, desire to develop a small (576 SF) drive-thru only coffee stand on the subject property. (Exhibit 11) Because the critical areas (stream and wetland) together with their required buffers completely encumber the entire property, no development can occur without approval of an RUE. (Exhibit 3) Thus, the current application was filed.
4. The review criteria for RUE applications are set forth at LMC 17.10.046(B). Those criteria and the facts disclosed by the record pertaining to each are as follows:

“B. The hearing examiner must determine that:

“1. Application of this chapter would deny all reasonable use of the property;”

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Facts: Section 17.10.059 LMC allows for buffer reductions to a width of not less than 75% of the standard buffer (resulting in this case in a minimum width of approximately 124 feet). Section 17.10.060 LMC does not allow for any reduction in the building setback. Even when applying the allowed buffer reduction, the provisions of this chapter would deny all reasonable use of the property because the required buffers extend beyond the boundaries of the property in all directions.

“2. There is no reasonable use with less impact on the sensitive area;”

Facts: The subject property is zoned PCD. The PCD (“Planned Commercial Development”) zone is an intensive commercial zone which is intended “to allow the planned commercial development of contiguous parcels under multiple ownerships with a degree of coordination and control not possible under other zoning classifications.” [LMC 21.46.050(B)(6), ¶ 1] The subject property is essentially cut off from all other PCD zoned property in the area by Alderwood Mall Parkway, the undeveloped right-of-way to the north, and the stream/wetland along its eastern edge. (Exhibits 3; 8; 11)

Gregg and the property owner have investigated various possible uses for this parcel. One proposal was for a tire store with a building footprint of 4,557 SF, amounting to 16% site coverage. (Exhibit 6) City staff did not believe that proposal would meet RUE criteria as it would have required filling part of the wetland. A sit-down coffee store such as a Starbucks was considered. It would have required a building of approximately 2,300 SF which would have been 8% site coverage. The current proposal involves only 2% building coverage and requires no disturbance of the wetland or stream. (Exhibits 1; 3; 11)

“3. The proposed development does not pose an unreasonable threat to the public health, safety or welfare; and”

Facts: Gregg has revised the proposed site plan as requested by Public Works to provide a 10-foot separation between the northern driveway and the property corner, to widen both ingress/egress curb cuts from 20 to 24 feet, and to create one ADA-compliant parking stall. (Cf. Exhibits 4 and 11) Gregg has also agreed to mark the exits as right-turn-only to improve traffic safety.³ (Exhibit 1, p. 6)

“4. Any alteration to the sensitive area must be the minimum necessary to allow for the reasonable use of the property; and”

Facts: The proposal will not alter the wetland or stream. The building will cover only 576 SF of the site. Approximately 9,628 SF of the site will be disturbed during construction, but approximately 3,362 SF of that area will be restored with native vegetation after

³ The Alderwood Mall Parkway section along the subject property’s frontage consists of four travel lanes with a center two-way-left-turn lane and a northbound right turn drop lane. (Exhibit 3, p. 1; and official notice)

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construction, resulting in a permanent impact area of only about 6,266 SF. The wetland buffer will be reduced from a minimum allowable width of 124 feet to a variable width of between 58 and 25 feet. The building setback from the buffer will be reduced from a standard width of 15 feet to a minimum width of 12 feet. (Exhibit 3) Because the business will be drive-thru only, it requires minimal on-site parking. (Exhibit 11) It is hard to imagine a reasonable commercial use of the subject property with a smaller footprint.

“5. Impacts to critical areas and buffers are mitigated consistent with the purpose and standards of this chapter to the greatest extent feasible; and”

Facts: Mitigation for the buffer reductions will consist of buffer enhancement to 8,285 SF of wetland and stream buffer by removing non-native species and planting native trees, shrubs, and groundcover. The proposed enhancements will improve critical area hydrology and habitat and will at least preserve, if not improve, water quality. (Exhibit 3; and testimony)

“6. The inability of the applicant to derive reasonable use of the property is not the result of actions of the property owner or some predecessor, which thereby created the condition after March 13, 2006.”

Facts: The property has been owned by the same family for several generations. It is a totally natural, undeveloped site. The inability of the applicant to derive reasonable use of the property is not the result of actions of the property owner or some predecessor.

5. Lynnwood’s State Environmental Policy Act (SEPA) Responsible Official issued a threshold Determination of Nonsignificance (DNS) for the proposal on November 23, 2016. (Exhibit 10) The DNS was not appealed. (Exhibit 1, p. 8; and testimony)
6. Public Works recommends approval of the requested RUE subject to four conditions.⁴ (Exhibit 1, p. 9) Gregg has no objection to any of the recommended conditions. (Testimony)
7. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK⁵

The Examiner is legally required to decide this case within the framework created by the following principles:

⁴ The Staff Report also discusses the application’s compliance with LMC 17.10.047. (Exhibit 1, pp. 4 and 5) That code section spells out the necessary submittal requirements for an RUE application. Suffice it to say, the Gregg application met those submittal requirements.

⁵ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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Authority

An RUE is a Process I application which requires an open record hearing before the Examiner. [LMC 17.10.046(A)] The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [LMC 1.35.100, .168, and .175]

“If the hearing examiner grants a reasonable use exception, the examiner may impose conditions to ensure that the development is consistent with the intent of [Chapter 17.10 LMC].” [LMC 17.10.046(D)]

Review Criteria

The review criteria for RUE applications are set forth at LMC 17.10.046(B), quoted in Finding of Fact 4, above.

A “consistency determination” is also required for every project application. A consistency determination follows four steps set forth at LMC 1.35.070. Consistency criteria are:

1. Type of land use permitted at the site, including uses that may be allowed under certain circumstances if decision criteria are met;
2. Density of residential development (if applicable); and,
3. Availability and adequacy of public facilities (for those facilities identified in the Comprehensive Plan, if the Plan or the City’s development regulations provide for funding of these facilities).

[LMC 1.35.070(A)]

Vested Rights

The City has no vesting regulations for land development applications. “Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, __ Wn. App. __ (Div. I, 2014)]

In the 1950s, the [state] supreme court first adopted the common law vested rights doctrine [for building permit applications]. ... In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications. They included conditional use permit applications, grading permit applications, shoreline substantial development permit applications, and septic permit applications.

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added ... RCW 19.27.095(1) and RCW 58.17.033(1) respectively ... [which] only refer to building permit applications and subdivision applications. ...

Most recently, in *Town of Woodway v. Snohomish County*, the [state] supreme court reiterated that "[w]hile it originated at common law, the vested rights doctrine is now statutory."

[*Potala*, Slip Opinion 6 – 8 and 11] "With these points in mind, [the *Potala* court held] that the filing of [an] application for [a] shoreline substantial development permit, without filing an application for a building permit, [does] not vest rights to zoning or other land use control ordinances." [*Potala*, Slip Opinion at 12] The *Potala* court "express[ed] no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions [were] not before [it]." [*Potala*, Slip Opinion at 25]

Historically, appellate courts have never applied the vested rights doctrine to applications for variances or exceptions from adopted standards.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [LMC 1.35.155 and 17.10.046(C)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The facts in evidence, as summarized in the Findings of Fact, above, demonstrate without question that an RUE is appropriate for this site and that the current proposal meets all requirements for issuance of an RUE.
2. The proposal passes the "consistency" test: The proposed drive-thru only coffee stand is a permitted use in the PCD zone; density is not relevant as this is not a residential use; and all evidence indicates that adequate public utilities are available to serve the proposed use.
3. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. When a permit involves a specific plan for development of a site, the Examiner believes it necessary to include a specific reference to the approved plan(s) in the conditions. Therefore, the Examiner will add a condition identifying Exhibit 11 as the approved site plan.

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- B. A few minor, non-substantive structure, grammar, and/or punctuation revisions to the Recommended Conditions will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
4. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS** the requested Reasonable Use Exception **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued January 17, 2017.

\s\ John E. Galt (Signed original in official file)

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁶

Robert Gregg
Todd Hall

Jared Bond

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Community Development Department a written request for reconsideration within seven calendar days following the issuance of this Decision in accordance with the procedures of LMC 1.35.168. Any request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. See LMC 1.35.168 for additional information and requirements regarding reconsideration.

⁶ The official Parties of Record register is maintained by the City's Hearing Clerk.

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NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record (See LMC 1.35.148.) with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of LMC 1.35.175 and the Land Use Petition Act [Chapter 36.70C RCW]. See LMC 1.35.175 for additional information and requirements regarding judicial appeals.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

CONDITIONS OF APPROVAL
CAP-013010-2016

This Reasonable Use Exception is subject to compliance with all applicable provisions, requirements, and standards of the Lynnwood Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. Exhibit 11 is the approved site plan for this Reasonable Use Exception.
2. The Permittee shall comply with all terms and conditions of the mitigation plan contained in Exhibit 3.
3. The Permittee shall post a performance security in accordance with LMC 17.10.140(B).
4. The Permittee shall post a maintenance and monitoring security for a term of five years in accordance LMC 17.10.140(C).
5. The Permittee/Owner shall record the areas designated as critical area and buffer as a Native Growth Protection Easement, permanently restricting the use of that area.